

Case Summary

Jerry Price (“Price”) appeals his maximum sentence of fifty years for Battery Upon a Child Resulting in Death as a Class A felony. Specifically, Price challenges the trial court’s finding and weighing of aggravators and mitigators and contends that his sentence is inappropriate. Concluding that the trial court did not abuse its discretion in finding and weighing the aggravators and mitigators and that the sentence is not inappropriate in light of the nature of the offense and Price’s character, we affirm.

Facts and Procedural History

On January 7, 2003, Price married Lynsee Yacks (“Lynsee”) who had a five-month-old infant daughter, R.Y. On January 31, 2003, while caring for R.Y., Price violently shook her in an attempt to stop her from crying. Price shook R.Y. so ferociously that her head bounced back and forth off of her chest. Later that evening, Lynsee discovered that R.Y. was unresponsive and called 911. Lynsee’s mother, Allison Womack, was one of the paramedics responding to her 911 call. R.Y. was transported to a hospital where she died the following day from shaken baby syndrome. Initially, Price was uncooperative with the police investigation, and it was not until his third statement to the police that he admitted to violently shaking R.Y.

On February 12, 2003, the State charged Price with Count I, Murder, a felony.¹ On April 17, 2003, the State amended its charging information to add Count II, Battery Upon a Child Resulting in Death as a Class A felony.² Also on April 17, 2003, Price and the State entered into a plea agreement whereby Price pled guilty to Count II and Count I

¹ Ind. Code § 35-42-1-1(2).

² Ind. Code § 35-42-2-1(a)(5).

was dismissed. The plea agreement left sentencing to the trial court. In sentencing Price, the trial court identified nine aggravating circumstances: (1) R.Y. was a victim of shaken baby syndrome; (2) R.Y.'s age; (3) Price's drug abuse history; (4) the impact of the crime on R.Y.'s family members; (5) Price's uncooperative behavior with the police; (6) Price's failure to seek immediate medical care and attention for R.Y.; (7) the harshness of the crime in light of the victim's age calling for rehabilitation that could only be provided in a penal facility; (8) Price's breach of trust in committing the offense and failing to be truthful with family members; and (9) Price's admission to shaking R.Y. on previous occasions. The trial court also identified three mitigating circumstances: (1) Price accepted responsibility for the crime by pleading guilty; (2) Price was twenty-one years old when he committed the crime; and (3) Price's lack of a substantial criminal history. Finding that the aggravators outweighed the mitigators, the trial court sentenced Price to fifty years. On October 16, 2006, Price filed a Petition for Permission to File a Belated Notice of Appeal, which was granted on February 5, 2007. This appeal now ensues.

Discussion and Decision

On appeal, Price raises two issues: (1) whether the trial court abused its discretion in finding and weighing the aggravators and mitigators and (2) whether his sentence is inappropriate.³ We address each issue in turn.

³ We note that because Price committed his offense in 2003, we operate under the former presumptive sentencing scheme rather than the current advisory sentencing scheme, which did not take effect until April 25, 2005.

I. Sentence Enhancement

Price contends that the trial court erred by sentencing him to the maximum term for a Class A felony. At the time of Price's offense and sentencing, Indiana Code § 35-50-2-4 provided in relevant part: "A person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances."

In general, sentencing lies within the discretion of the trial court. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). As such, we review sentencing decisions only for an abuse of discretion, "including a trial court's decision to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances." *Id.* Furthermore, "[w]hen enhancing a sentence, a trial court must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reasons why each circumstance is aggravating or mitigating; and (3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating circumstances." *Vazquez v. State*, 839 N.E.2d 1229, 1232 (Ind. Ct. App. 2005), *trans. denied* (quoting *Bailey v. State*, 763 N.E.2d 998, 1004 (Ind. 2002)). A single aggravating circumstance is adequate to justify an enhanced sentence. *Moon v. State*, 823 N.E.2d 710, 717 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*.

A. Aggravators

Price first argues that the trial court abused its discretion in using improper aggravators to enhance his sentence. The trial court found nine aggravating

circumstances: (1) R.Y. was a victim of shaken baby syndrome; (2) R.Y.'s age; (3) Price's history of drug abuse; (4) the impact of the crime on R.Y.'s family members; (5) Price's uncooperative behavior with the police; (6) Price's failure to seek immediate medical care and attention for R.Y.; (7) the harshness of the crime in light of the victim's age calling for rehabilitation that could only be provided in a penal facility; (8) Price's breach of trust in committing the offense and failing to be truthful with family members; and (9) Price's admission to shaking R.Y. on previous occasions. Price challenges all nine aggravators.

First, Price contends that the trial court abused its discretion in considering the fact that R.Y. was the victim of shaken baby syndrome and that R.Y. was less than fourteen years of age, claiming both aggravating circumstances regard the victim's age and therefore are not valid considerations. Price is correct that, generally, where a victim's age is an element of the offense, it may not be considered as an aggravator to support an enhanced sentence. *McCarthy v. State*, 749 N.E.2d 528, 539 (Ind. 2001). However, a trial court may consider the particularized circumstances of the crime as an aggravating factor if the court specifies why the defendant deserves an enhanced sentence under the particular circumstances. *Henderson*, 769 N.E.2d at 180. Here, the trial court specified that Price deserved an enhanced sentence under the particular circumstances because "the infant child could not defend herself or care for herself by virtue of her tender years." Appellant's App. p. 19. Consequently, the trial court's consideration of these two aggravators was proper.

Price further claims that the trial court abused its discretion in considering his extensive history of drug abuse as an aggravating circumstance. Specifically, Price contends that because he admitted to having a drug abuse problem and sought counseling and assistance to deal with this problem, the trial court should have minimized the weight it accorded to this aggravator. While we commend Price for seeking treatment for his drug dependency, we note that the trial court's consideration of Price's delinquent behavior, namely, his extensive drug abuse history, is well within the statutorily-defined considerations allowable in determining what sentence a trial court may impose for a crime. *See* Ind. Code § 35-38-1-7.1(a)(2); *see also Foster v. State*, 795 N.E.2d 1078, 1091 (Ind. Ct. App. 2003) (considering a defendant's history of drug and alcohol abuse as a valid aggravator). As such, the trial court did not abuse its discretion in considering and weighing Price's history of drug abuse as an aggravating circumstance.

Price next argues that the trial court abused its discretion in considering the impact of the crime on the victim's family as an aggravating circumstance. In considering this as an aggravator, the trial court stated:

The court finds also as an aggravating circumstance the fact that six (6) victim family members are under psychiatric care which is a particularly aggravating situation in light of the fact that some of said family members are firefighters and paramedics and the fact that they are required to have psychiatric care may jeopardize emergency services to be provided by them in the future by virtue of the trauma they received in this particular case; particularly by the trauma of paramedic/firefighter Allison Womack responding to the call of her granddaughter being the victim in this case.

Appellant's App. p. 20. In assessing the validity of a trial court's consideration of the impact of a crime on the victim's family as an aggravating circumstance, our Supreme Court has held:

The impact on others may qualify as an aggravator in certain cases but the defendant's actions must have had an impact on . . . other persons of a destructive nature that is not normally associated with the commission of the offense in question and this impact must be foreseeable to the defendant.

Bacher v. State, 686 N.E.2d 791, 801 (Ind. 1997) (quotations omitted). Thus, in order for the impact on others to be properly considered by a trial court as an aggravator, the trial court must identify the destructive nature that the crime had on others not normally associated with the particular offense, and the impact must be foreseeable to the defendant. Here, the trial court's explanation, as seen above, properly identifies the destructive impact this crime had on six of R.Y.'s family members not normally associated with the commission of the offense. However, the trial court failed to set forth how this impact on R.Y.'s family was foreseeable to Price. We therefore agree with Price that the trial court abused its discretion by considering the impact of the crime on R.Y.'s family as an aggravating circumstance.

Price next argues that the trial court abused its discretion in considering the harshness of the crime in light of R.Y.'s young age calling for rehabilitation that could only be provided by a penal facility. In considering this aggravator, the trial court stated that it "finds that the violence inflicted [sic] upon this victim was particularly harsh in light of the victim's age of 5 or 6 months calling for rehabilitation that can only be provided in a penal facility." Appellant's App. p. 20. "As long as the trial court explains why a defendant requires rehabilitation in a correctional facility for a period in excess of the presumptive sentence, this finding may constitute a proper aggravating circumstance." *Roney v. State*, 872 N.E.2d 192, 199 (Ind. Ct. App. 2007), *trans. pending*.

Here, the trial court sufficiently explained Price's need for rehabilitation in a penal facility by noting the harshness of the crime. *See Ajabu v. State*, 722 N.E.2d 339, 343-44 (Ind. 2000) (holding the explanation of brutal nature of crimes and ages of victims constituted sufficient support for aggravating circumstance of defendant's need for correctional treatment in a penal facility).

Price next contends that the trial court abused its discretion in considering the remaining four aggravators—Price's uncooperative behavior with the police, Price's failure to seek immediate medical care and attention for R.Y, Price's breach of trust in committing the offense and failing to be truthful with family members, and Price's admission to shaking R.Y. on previous occasions—because “the sentencing order fails to state the specific reasons why each circumstance is considered to be an aggravating circumstance.” Appellant's Br. p. 12. Price is correct that if a trial court relies on aggravating circumstances to enhance or reduce a presumptive sentence, it must state the specific reason why each circumstance is determined to be aggravating. *See McCann v. State*, 749 N.E.2d 1116, 1119 (Ind. 2001). However, here, the trial court did state a specific reason why each remaining circumstance was aggravating.

The trial court found Price's uncooperative behavior with the police to be aggravating because “the Defendant gave inconsistent statements to the police misleading the investigation and it took the Defendant three (3) statements to give the truth to the police.” Appellant's App. p. 20. The trial court found Price's failure to seek immediate medical care and attention for R.Y. to be aggravating because Price did not seek medical attention for R.Y. knowing that she needed it. The trial court found Price's breach of

trust in committing the offense and failure to be truthful with family members aggravating because Lynsee left R.Y. with Price to care for and nurture her and instead he committed the instant offense. Finally, the trial court found Price's admission that he shook R.Y. on four or five previous occasions particularly aggravating. Here, the trial court adequately specified its consideration of each circumstance and therefore did not abuse its discretion.

To summarize, eight of the nine aggravating circumstances relied upon by the trial court in this case were proper.

B. Mitigators

Price next argues that the trial court abused its discretion by failing to give more weight to the mitigating circumstances, namely, Price's guilty plea and acceptance of responsibility for his actions. Specifically, Price contends "[t]he mitigators set out by the trial court substantially temper the aggravators, making it impossible to reach the maximum sentence." Appellant's Br. p. 13. We disagree. It is well established that the weight to be given to mitigating factors is a matter within the discretion of the trial court. *Page v. State*, 689 N.E.2d 707, 711 (Ind. 1997). Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. *Sherwood v. State*, 749 N.E.2d 36, 38 (Ind. 2001).

Price's sole contention in this regard is that the trial court gave insufficient weight to the fact that he pled guilty and accepted responsibility for his criminal actions.⁴ "[A]

⁴ Price's initial appellate brief does not challenge the mitigating weight accorded to his lack of a substantial criminal history or age. However, Price's Reply Brief sets forth new issues and arguments regarding the mitigating weight of these two factors in an apparent response to the State's argument addressing these issues. "The law is well settled that grounds for error may only be framed in an

guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea[.]” *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied*. Here, Price did receive a substantial benefit in return for pleading guilty. Namely, the State agreed to dismiss the murder charge. Therefore, the trial court did not abuse its discretion in not giving greater mitigating weight to Price’s guilty plea.

In sum, the trial court abused its discretion by improperly considering as an aggravator the impact of this offense on R.Y.’s family. Nonetheless, even if a trial court finds improper aggravators, we will affirm the sentence when we can say with confidence that the trial court would have imposed the same sentence if it had considered the proper aggravating circumstances. *See Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002); *Comer v. State*, 839 N.E.2d 721, 725 (Ind. Ct. App. 2005), *trans. denied*. Here, the trial court properly considered eight of the nine aggravators. In light of these aggravators and the fact that the trial court accorded sufficient weight to the mitigators, we can say with confidence that even if the trial court had not considered the improper aggravator, it still would have imposed a maximum executed sentence.

II. Inappropriate Sentence

Price also argues that his fifty-year sentence is inappropriate in light of the nature of his offense and his character. Indiana Rule of Appellate Procedure 7(B) states: “The Court may revise a sentence authorized by statute if, after due consideration of the trial

appellant’s initial brief and if addressed for the first time in the reply brief, they are waived.” *Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 997 (Ind. 2005); *see also* Ind. Appellate Rule 46(C) (“No new issues shall be raised in the reply brief.”). Thus, by not challenging the mitigating weight accorded to his lack of criminal history and age in his initial appellate brief, Price waived this argument on appeal.

court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Purvis v. State*, 829 N.E.2d 572, 587 (Ind. Ct. App. 2005) (internal citations omitted), *trans. denied, cert. denied*, 126 S. Ct. 1580 (2006). The burden is on the defendant to persuade us that the sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). After due consideration of the trial court's decision, we cannot say that Price's sentence is inappropriate.

The nature of the offense is abominable. Price, while caring for his five-month-old stepdaughter, violently and repeatedly shook her to the point that her head was bouncing back and forth off of her own chest resulting in death. As to Price's character, we acknowledge, as did the trial court, his lack of a substantial criminal history. Nevertheless, he has a substantial history of drug abuse dating back to age fifteen and admits to being drug dependent, he did not seek immediate medical attention for R.Y. knowing that she was injured, he did not initially cooperate with the police during the investigation of this incident, and he breached the trust given to him by Lynsee to care for R.Y. Given the nature of his offense and his character, Price's maximum executed sentence of fifty years is not inappropriate.

Affirmed.

ROBB, J., and BRADFORD, J., concur.